IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent, v. TEODULO RODRIGUEZ, Appellant.	)	No. 63273-6-I UNPUBLISHED OPINION FILED: July 26, 2010

Schindler, J. — Teodulo Rodriguez appeals his felony stalking conviction. Rodriguez argues that the trial court erred in allowing the State to amend the information to enlarge the charging period. Because Rodriguez has not established prejudice, we affirm.

FACTS

On December 14, 2007, a King County court entered a no-contact order prohibiting Rodriguez from contacting his former girlfriend Maria Del Rosario Beltran for five years. In May 2008, Beltran was employed at a factory in Kent. Over the course of several days in May and June, Rodriguez attempted to contact Beltran at her home and workplace.

A coworker testified that on either May 28 or 29, Rodriguez got out of his car and

approached him while he was outside on break during the night shift. Rodriguez asked the coworker what time the shift ended, whether he knew Beltran, and whether she was talking to other men at the factory. On May 30, Rodriguez came to the factory again. He entered the employee work area, banged on the window, and gestured to Beltran. After Rodriguez was asked to leave "more than once," he left, but returned again later the same night. Beltran's coworker reported the incident to his supervisor, and later that evening, the police came to the factory.

At trial, the coworker confirmed that he gave a statement to the police on May 30. Beltran also testified that the police came to the factory the same night Rodriquez banged on the window. The coworker also testified that he saw Rodriguez's car at the factory the following night, and "probably saw it another three times" after that.

Beltran's sixteen year-old son, A.B., testified that during this same time period, Rodriguez called Beltran at home a couple of times per day. A.B. said that he tried to keep Rodriguez talking on the telephone, so his mother could leave the house and take the bus to work without being followed. Rodriguez told A.B. that he was parked nearby and that he would "get to" Beltran either at home or at work. Rodriguez also told A.B. that he would take Beltran or both Beltran and A.B. "so nobody could know where [they] were at" and "do bad things" to them. In his statement to the police, A.B. said Rodriguez started calling his mother on May 29. But at trial, A.B. testified that the phone calls actually started "a couple of days before that."

On June 2, Rodriguez approached Beltran at a bus stop while she was waiting to

catch the bus to work. Rodriguez put his hand around Beltran's neck, hit her, and tried to push her into his car. Beltran cried and pleaded with Rodriguez to stop. An onlooker called 911. The police responded and arrested Rodriguez.

The State charged Rodriguez with one count of felony stalking alleging that "during a period of time intervening between May 29, 2008 through June 2, 2008" Rodriguez "did, without lawful authority, intentionally and repeatedly harass or follow Maria del Rosario Beltran; and Maria del Rosario Beltran was reasonably placed in fear that the defendant intended to injure her." Rodriguez was also charged with one count of felony violation of a no-contact order based on the assault of Beltran.

Before trial, the State filed an amended information alleging alternative grounds for elevating the stalking charge to a felony: Rodriguez's previous conviction for harassing Beltran, and stalking in violation of a court order protecting Beltran.[1]

At trial, Beltran, Beltran's coworker, and her son A.B. testified. The State also presented the testimony of the person who witnessed and reported the June 2 assault, as well as the police officers who responded to the 911 call.[2]

At the conclusion of the State's case in chief, the prosecutor moved to amend the information based on A.B.'s testimony to change the dates of the alleged stalking charge from "May 29, 2008 through June 2, 2008" to "May 27, 2008 through June 2,

[1] See RCW 9A.46.110(5)(b).

[2] Additionally, the State presented the testimony of a person who witnessed Rodriguez assault Beltran in September 2007. Rodriguez was convicted of unlawful imprisonment based on this incident and the no-contact order prohibiting contact with Beltran was issued as a result of this conviction. The State was allowed to present this evidence to show that Beltran was placed in reasonable fear in May and June of 2008 that Rodriguez intended to injure her.

2008." Rodriguez objected, stating that his "entire cross-examination" was "based on the dates that have previously been charged." Rodriguez also asserted that the amendment would prejudice him because his "cross[-]examination would have been slightly different" based on the new charging dates. The trial court rejected the defense argument, and allowed the amendment, noting "[i]t is permissible to allow an amendment to conform with the evidence as long as it doesn't create surprise or prejudice to the defense." The court found:

> [T]he defense was aware that calls had been made, and the Court doesn't believe that –at least there hasn't been a showing made that the defense would have been different had the defense been aware prior to this time that there were some allegations of a few calls before [May 29]."

The amended information alleged that "during a period of time intervening between May 27, 2008 through June 2, 2008" Rodriguez did, without lawful authority, intentionally and repeatedly harass or follow Maria Del Rosario Beltran; and Maria Del Rosario Beltran was reasonably placed in fear that the defendant intended to injure her."

Rodriguez did not testify and the defense did not present the testimony of any other witnesses. The jury convicted Rodriguez of felony stalking and felony violation of a no-contact order. The court imposed a standard range sentence of 17 months.

ANALYSIS

On appeal, Rodriguez challenges his conviction for felony stalking. Rodriguez argues the trial court abused its discretion in allowing the State to amend the

information to change the charging dates. Rodriguez contends that he was prejudiced because the amendment changing the charging period encompassed additional acts not alleged in the original information. Rodriguez asserts that amendment of the charging period in this case undermined his defense to the felony stalking charge because he was deprived of the opportunity to cross examine A.B. on the basis of the new charging dates and because his defense was "highly focused on the State's ability to prove that the acts occurred within the charging period."

The trial court may permit the State to amend the information at any time before verdict or finding if the defendant's substantial rights are not prejudiced. CrR 2.1(d). A defendant's constitutional right to be notified of the nature of the charges against him under article I, section 22 of the Washington State Constitution, limits the ability of a court to permit the amendment of an information against the defendant under CrR 2.1(d). State v. Markle, 118 Wn.2d 424, 437, 823 P.2d 1101 (1992); State v. Pelkey, 109 Wn.2d 484, 490, 745 P.2d 854 (1987). The burden is upon the defendant to show prejudice. State v. Gosser, 33 Wn. App. 428, 434-35, 656 P.2d 514 (1982). We review a trial court's ruling on a motion to amend an information for an abuse of discretion. State v. Schaffer, 120 Wn.2d 616, 621-22, 845 P.2d 281 (1993).

In Pelkey, our supreme court ruled that amending an information to charge a new crime after the State rests violates the defendant's rights under article I, section 22. Pelkey, 109 Wn.2d at 487. The court held that a "criminal charge" may not be amended after the State's case in chief "unless the amendment is to a lesser degree of

the same charge or a lesser included offense." Pelkey, 109 Wn.2d at 491. This is because an amendment to the criminal charge after the State rests may run afoul of the defendant's constitutional rights to know the nature and cause of the accusation against him. Pelkey, 109 Wn.2d at 487.

Rodriguez argues that this case is controlled by Pelkey. However, "the rule announced in Pelkey is not applicable to all amendments to informations." State v. DeBolt, 61 Wn. App. 58, 61, 808 P.2d 794 (1991). As the court pointed out in Pelkey, the constitutional limitations of amending the charge are not implicated, by amendments which "merely specif[y] a different manner of committing the crime originally charged." Pelkey, 109 Wn.2d at 490 (citation omitted). In DeBolt, this court held that the date of an offense is a "matter of form rather than substance" and is usually "not a material part of the 'criminal charge[.]'" Debolt, 61 Wn. App. at 62; see also State v. Allyn, 40 Wn. App. 27, 35, 696 P.2d 45 (1985). Accordingly, amendment of the charging period is generally permitted, unless the amendment compromises an alibi defense or the defendant demonstrates specific prejudice. DeBolt, 61 Wn. App. at 62; State v. Fischer, 40 Wn. App. 506, 510-11, 699 P.2d 249 (1985).

In DeBolt, the State moved to amend the information to enlarge the charging period by several months. The State made the motion to amend after it had rested and after the defendant had testified. On appeal, the court rejected DeBolt's argument that the amendment was barred by Pelkey and denied his constitutional right to know the nature and cause of the accusation against him.

Pelkey refers to a 'criminal charge' being amended. Since the date

> here was not a material part of the 'criminal charge', this case falls outside the ambit of Pelkey.

(Citation omitted.) DeBolt, 61 Wn. App. at 62. The court noted that "the crime charged remained the same after the amendment." DeBolt, 61 Wn. App. at 62. Thus, the court concluded that amendment of the charging dates neither violated DeBolt's constitutional rights, nor resulted in prejudice. DeBolt, 61 Wn. App. at 63.

Rodriguez contends that because the amended charging dates included additional acts that were not within the original charging period, this case is unlike Allyn and State v. Downing, 122 Wn. App. 185, 93 P.3d 900 (2004), where the court held that an amendment changing the charging dates did not prejudice the defense. However, in both Allyn and Downing, the amended charging dates allowed the jury to convict based upon acts that were outside the original charging period.

In Allyn, the defendant was charged with marijuana possession based on drugs uncovered in a search. The original information alleged that Allyn possessed the marijuana on December 28, 1982. The testimony showed that the search took place on a different date, January 7, 1983. In Downing, the defendant was charged with bail jumping on February 22, 2002. But the testimony established that the act that constituted bail jumping, his failure to appear in court, occurred on March 14, 2002. Amendment of the dates of the charging period was allowed in both cases and upheld on appeal because the defendants were not prejudiced, even though the amended charging dates allowed conviction for acts not within the charging dates contained in the original information. Allyn, 40 Wn. App. at 35; Downing, 122 Wn. App. at 193-94.

The out-of-state cases Rodriguez cites are not analogous. For example, in the case that Rodriguez primarily relies on, State v. Spangler, 38 Kan. App.2d 817, 173 P.3d 656 (Kan. App., 2007), Spangler was charged with, among other crimes, conspiracy to manufacture methamphetamine on or about March 15, 2005. Just before the State rested, the trial court allowed it to amend the charge to extend the charging dates for a six-month time period.[3] At that point, Spangler had nearly completed cross examining all of the State's witnesses and her defense was that the State could not establish that she took part in the manufacture that undisputedly took place on March 15, 2005.[4] Because Spangler's defense was specific to the original charging date, the amendment "substantially prejudiced" Spangler's defense.[5] Spangler, 173 P.3d at 665.

This case is not like Spangler. Here, as in DeBolt, Alllyn, and Downing because Rodriguez was on notice of the nature of the felony stalking charge and the "crime charged" remained the same before and after the amendment, he cannot show prejudice. DeBolt, 61 Wn. App. at 62.

At trial, Rodriguez argued that the State presented insufficient evidence that the

[3] The court also allowed the State to amend the charge to allege specific overt acts not specified in the original complaint and to name the party who committed the acts.

[4] The court found that this prejudice was compounded by the fact that Spangler was provided no notice of the specific acts the State was relying on until the close of its evidence. Spangler, 173 P.3d at 665.

[5] The additional cases from other jurisdictions Rodriguez cites are likewise factually distinguishable. Most involve an original charge based on a specific, discrete act which occurred at a specified time. Later amendment of charging dates allowed conviction based on a separate uncharged incident and violated the accused's right to be notified of the charges against him. See e.g. People v. Dominguez, 166 Cal. App. 4th 858, 83 Cal. Rptr. 3d 284 (2008); People v. Kellin, 209 Cal. App. 2d 574, 25 Cal. Rptr. 925 (1962).

alleged stalking occurred within the charged timeframe based on his contention that the witnesses were not sufficiently clear or specific about the dates when Rodriguez went to the factory and made threatening phone calls. However, the inclusion of the two additional days to the charging period did not compromise or affect that defense. In closing, Rodriquez argued that Beltran did not testify that he harassed or followed her

on particular dates and her coworker did not provide exact dates of when he saw Rodriguez at the factory. Rodriguez noted that only one witness, A.B., provided a specific date for an act of harassment, the one phone call which occurred on May 29. And Rodriquez claimed that A.B., a teenager, was not credible on that point. But contrary to his argument, the uncontroverted evidence established that Rodriguez repeatedly harassed and followed Beltran by going to her workplace on May 28 or 29, May 30, and May 31. The evidence further established that Rodriguez made a threatening call to Beltran at her home on May 29, and assaulted her at the bus stop on June 2. Because the evidence was sufficient to convict Rodriguez of felony stalking based on the original charging dates of May 29 to June 2, he was not prejudiced by the amendment expanding the charging dates by two days to May 27.

Because Rodriguez failed to establish prejudice, the trial court was within its discretion in granting the amendment. We affirm.

WE AFFIRM: